Ng Kim Gek & Anor v New Age Portfolio Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02(NCvC)(W)-1394–07 OF 2019
MOHAMAD ZABIDIN, HADHARIAH ISMAIL AND AHMAD NASFY JJCA
21 JANUARY 2022

Contract — Sale and purchase of land — Balance of purchase price — Respondent entered into sale and purchase agreement with appellants — Appellants failed to pay balance of purchase price — Whether respondent's claim barred by res judicata — Whether there was oral agreement by respondent to give property to appellants in contra for monies due to appellants from respondent — Whether respondent's claim barred by limitation under s 6(1)(a) of the Limitation Act 1963 — Whether appellants liable to pay balance of purchase price — Limitation Act 1963 s 6(1)(a)

The appellants had entered into a sale and purchase agreement ('the agreement') with the respondent to purchase a double storey house known as Lot 35, Kinrara Hills, Bandar Kinrara ('the said property'). Due to the failure of the appellants to pay the balance of purchase price amounting to RM1,233,333, the respondent had brought an action at the High Court claiming the same. The appellants denied they were liable to pay the balance purchase price on three grounds: (a) the claim was barred by res judicata on account of there was a claim by Dato' Lai in civil suit 22NCVC-298–12 of 2016 ('the earlier action') against the appellants here for the balance purchase price due under the agreement; (b) Dato' Lai and/or the respondent had orally agreed to give the property to the appellants in contra for the monies due to the appellants from the respondent; and (c) the respondent's claim for the balance of the purchase price was filed more than six years after the date the agreement was signed, as such, the claim was barred by s 6(1)(a) of the Limitation Act 1953. At the end of the case, the learned High Court judge ('the HCJ') allowed the respondent's claim for RM1,233,333 with 5% interest, being the balance of purchase price of the said property. Aggrieved by the decision, the appellants filed the present appeal. The issues to be considered by the court were res judicata; limitation and whether the learned HCJ had erred in Her Ladyship's finding that the appellants had failed to prove that the respondent through Dato' Lai had orally agreed to give the property to the appellants in contra for the monies due to them.

Held, dismissing the appeal, and affirming the decision of the HCJ with costs of RM30,000 to the respondent subject to allocator fees:

(1) The court agreed with the learned HCJ that 'res judicata' did not apply in this case. To sustain a plea of res judicata, it was important to look at the substance of what had been litigated and decided in the earlier action. The point in issue in the earlier action that was determined and with precision was that Dato' Lai had no locus standi to bring the action against the appellants as the purported assignment was invalid. No adjudication was made by the Court of Appeal on the issue of whether the appellants had paid the balance of the purchase price under the agreement which was the core issue in the present appeal. Therefore, the learned HCJ had not fallen into error when Her Ladyship decided that res judicata did not apply in the present case. Further, the doctrine of res judicata was not an inflexible rule. The court may decline to apply it in cases where it would be unjust to do so as in the present case (see paras 16–19).

(2) It was the finding of the learned HCJ that it was not in dispute that no progress payments were sought by the respondent from the appellants during the construction of the property and no date was set for payment of the purchase price. Hence, the learned HCJ found the balance purchase price only became payable when the construction of the property was completed and when the respondent by letter dated 23 February 2012, gave the appellants 14 days to take vacant possession of the property and to pay the purchase price. Thus, the learned HCJ found the appellants' obligation to pay the purchase price arose 14 days after the 14 days period. Since the suit was brought against the appellants on 28 February 2018, the court found the learned HCJ was right in concluding that the defence of limitation put up by appellants was unmeritorious (see para 22).

(3) It was trite law that the specific finding of facts by the learned HCJ as a trier of facts should not be disturbed by an appellate court such as the Court of Appeal in the present case unless that finding was plainly wrong. Based on the learned HCJ's grounds of judgment, it was clear that the learned HCJ had undertaken a detailed analysis of all the available evidence presented by both parties before making a finding of fact that the existence of the alleged contra agreement was not proven. Thus, the allegation by the appellants that the learned HCJ had failed to consider all the available evidence presented before making her decision was rather inaccurate. On the contrary, the learned HCJ had sufficiently and judiciously appreciated all the evidence presented by both parties. The appellants failed to convince the present court that the learned HCJ was plainly wrong in her finding of fact on this issue. Hence, this issue had no merit. In totality, there was no appealable error made by the learned HCJ that could warrant appellate intervention (see paras 23 & 29–30).

[Bahasa Malaysia summary

Perayu-perayu telah memeterai perjanjian jual beli ('perjanjian tersebut') dengan responden untuk membeli rumah dua tingkat yang dikenali sebagai Lot 35, Kinrara Hills, Bandar Kinrara ('hartanah tersebut'). Disebabkan kegagalan perayu-perayu membayar baki harga belian berjumlah RM1,233,333, responden telah memfailkan tindakan di Mahkamah Tinggi bagi menuntut jumlah tersebut. Perayu-perayu menafikan mereka bertanggungjawab untuk membayar baki harga belian atas tiga alasan: (a) tuntutan tersebut dihalang oleh res judicata kerana terdapat tuntutan oleh Dato' Lai dalam Guaman Sivil 22NCVC-298–12 Tahun 2016 ('tindakan terdahulu') terhadap perayu-perayu di sini bagi baki harga belian yang perlu dibayar di bawah perjanjian tersebut; (b) Dato' Lai dan/atau responden secara lisan telah bersetuju untuk memberikan harta tersebut kepada perayu-perayu sebagai kontra bagi wang yang terhutang kepada perayu-perayu daripada responden; dan (c) tuntutan responden untuk baki harga belian telah difailkan lebih daripada enam tahun selepas tarikh perjanjian ditandatangani, oleh itu, tuntutan tersebut telah dihalang oleh s 6(1)(a) Akta Had Masa 1953. Pada akhir kes, hakim Mahkamah Tinggi yang bijaksana ('HMT') membenarkan tuntutan responden sebanyak RM1,233,333 bersama faedah 5% sebagai baki harga belian hartanah tersebut. Terkilan dengan keputusan tersebut, perayu memfailkan rayuan semasa. Isu-isu yang perlu dipertimbangkan oleh mahkamah ialah res judicata; had masa dan sama ada HMT yang bijaksana telah tersilap dalam dapatannya bahawa perayu-perayu telah gagal membuktikan bahawa responden melalui Dato' Lai telah secara lisan bersetuju untuk memberikan harta tersebut kepada perayu-perayu sebagai kontra untuk wang yang perlu dibayar kepada mereka.

Diputuskan, menolak rayuan dan mengesahkan keputusan HMT dengan kos RM30,000 diberikan kepada responden tertakluk kepada bayaran alokatur:

(1) Mahkamah bersetuju dengan HMT yang bijaksana bahawa 'res judicata' tidak terpakai dalam kes ini. Untuk mengekalkan pli res judicata, adalah penting untuk melihat isi kandungan perkara yang telah dibicarakan dan diputuskan dalam tindakan terdahulu. Perkara yang menjadi isu dalam tindakan terdahulu yang telah ditentukan dan dengan tepat ialah Dato' Lai tidak mempunyai locus standi untuk membawa tindakan terhadap perayu-perayu kerana penyerahan hak yang dikatakan tidak sah. Tiada adjudikasi dibuat oleh Mahkamah Rayuan berhubung isu sama ada perayu telah membayar baki harga pembelian di bawah perjanjian tersebut yang menjadi isu teras dalam rayuan semasa. Oleh itu, HMT yang bijaksana tidak terkhilaf apabila Yang Arif memutuskan bahawa res judicata tidak terpakai dalam kes ini. Selanjutnya, doktrin res judicata bukanlah peraturan yang tidak fleksibel. Mahkamah boleh menolak untuk menggunakannya dalam kes yang mana mahkamah dapati tidak

adil untuk menggunakannya seperti dalam kes semasa (lihat perenggan 16–19).

(2) Adalah dapatan HMT yang bijaksana bahawa tidak menjadi pertikaian bahawa tiada bayaran progresif diminta oleh responden daripada perayu-perayu semasa pembinaan hartanah tersebut dan tiada tarikh ditetapkan untuk pembayaran harga belian. Oleh itu, HMT yang bijaksana mendapati baki harga belian hanya perlu dibayar apabila pembinaan hartanah tersebut siap dan apabila responden melalui surat bertarikh 23 Februari 2012, memberi perayu 14 hari untuk mengambil milikan kosong hartanah tersebut dan membayar harga belian. Oleh itu, HMT yang bijaksana mendapati kewajipan perayu untuk membayar harga belian timbul 14 hari selepas tempoh 14 hari tersebut. Memandangkan saman tersebut dimulakan ke atas perayu-perayu pada 28 Februari 2018, mahkamah mendapati HMT yang bijaksana adalah betul dalam membuat kesimpulan bahawa pembelaan had masa yang dikemukakan oleh perayu-perayu adalah tidak bermerit (lihat perenggan 22).

(3) Sudah menjadi undang-undang yang mantap bahawa dapatan-dapatan fakta khusus oleh HMT yang bijaksana sebagai pembicara fakta tidak boleh diganggu oleh mahkamah rayuan seperti Mahkamah Rayuan dalam kes ini melainkan dapatan tersebut jelas salah. Berdasarkan alasan penghakiman HMT yang bijaksana, adalah jelas bahawa HMT yang bijaksana telah menjalankan analisis terperinci terhadap semua keterangan yang ada yang dikemukakan oleh kedua-dua pihak sebelum membuat dapatan fakta bahawa kewujudan perjanjian kontra tersebut tidak dibuktikan. Oleh itu, dakwaan perayu bahawa HMT yang bijaksana telah gagal untuk mempertimbangkan semua keterangan yang ada yang dikemukakan sebelum membuat keputusannya adalah agak tidak tepat. Sebaliknya, HMT yang bijaksana telah menghargai semua keterangan yang dikemukakan oleh kedua-dua pihak secukupnya dan secara adil. Perayu-perayu gagal untuk meyakinkan mahkamah ini bahawa HMT yang bijaksana jelas salah dalam dapatan fakta mengenai isu ini. Oleh itu, isu ini tidak mempunyai merit. Secara keseluruhannya, tiada kekhilafan rayaun yang dibuat oleh HMT yang bijaksana yang mewajarkan campur tangan rayuan (lihat perenggan 23 & 29–30).]

Cases referred to

Farlim Properties Sdn Bhd v Goh Keat Poh & Ors and other appeals [2003] 4 MLJ 654; [2003] 4 CLJ 505, CA (refd)

Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1; [2004] 4 CLJ 309, FC (refd)

Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97; [2003] 2 CLJ 19, CA (refd)

Ming Holdings (M) Sdn Bhd v Tuan Syed Azahari bin Noh Shahabudin &

Anor [2010] 4 MLJ 577; [2010] 6 CLJ 857, FC (refd)
Nasri v Mesah [1971] 1 MLJ 32; [1970] 1 LNS 85, FC (refd)
The Pacific Bank Bhd v Chan Peng Leong [1998] 2 MLJ 613, CA (refd)

Legislation referred to

Limitation Act 1953 ss 6, 6(1)(a), 29(b)
Rules of Court 2012 O 18 r 19(1), (1)(b) , (1)(d)

Appeal from: Civil Suit No BA-22NCvC-95–02 of 2018 (High Court, Shah Alam)

Desmond Choi Wai Onn (Anas Rashid with him) (Thomas Lai & RJ Soo) for the appellant.
Kumareson s/o Chandrarajan (Pramod Nambiar with him) (Francis Pereira & Shan) for the respondent.

Mohamad Zabidin JCA (delivering judgment of the court):

[1] This appeal relates to the judgment of the High Court dated 26 June 2019 in which the learned High Court judge allowed the respondent's claim for RM1,233,333 with 5% interest, being the balance of purchase price of a double storied house bought by both appellants from the respondent.

[2] We heard the appeal on 26 January 2021 and at the end of which we found no appealable error made by the learned High Court judge. Hence, we dismissed the appeal. We accordingly affirmed the decision of the High Court dated 26 June 2019. Below are our grounds. For ease of reference, parties in this appeal will be referred to as they were in the High Court.

BACKGROUND FACTS

[3] The salient background facts that are relevant to this appeal are produced below:

(a) the first and second defendants were the original directors and shareholders of the plaintiff. The first defendant was the nominee of her husband, See Sai Hong (DW2);

(b) on 24 April 2008, the plaintiff purchased a piece of land ('land') in Pekan Kinrara, Petaling, Selangor from Perumahan Kinrara Bhd for development;

(c) about a month later, the defendants sold their shares in the plaintiff to Dato' Lai Yeng Fack ('Dato' Lai') (PW1) and his nominees and also resigned from their positions as directors in the plaintiff;

(d) in 2010, the plaintiff constructed semidetached double storey houses on the land for sale;

(e) on 21 December 2010 a sale and purchase agreement was entered into between the plaintiff as a vendor and the defendants as purchasers ('agreement') to purchase a double storey semi-detached house known as Lot 35, Kinrara Hills, Bandar Kinrara for RM1,473,333 ('said property');

(f) soon after the execution of the agreement, the defendants applied for a loan from OCBC bank. There is a dispute here as to the purpose of the defendants applying for the loan;

(g) by letter dated 23 February 2012, the plaintiff gave the defendants 14 days to take vacant possession of the property;

(h) in early 2013, the defendants entered into a sale and purchase agreement to sell the property to one Chen Kong Fui and Chan Ooi Ling for RM2m. On 7 June 2013, the defendants received a letter from plaintiff's solicitor, Messrs Tengku Maria, Lim & Ong seeking the payment of the purchase price due under the agreement. One by the name of See Sai Hong who was the husband of Ng Kim Gek (the first defendant) went to see Dato' Lai upon the receipt of the said letter;

(i) on 13 June 2013, Dato' Lai issued a letter to Messrs Iqbal, Hakim, Sia & Voo confirming that the Defendants have paid the purchase price in full. Messrs Iqbal, Hakim, Sia & Voo was the legal firm acting for the financiers of Chen Kong Fui and Chan Ooi Ling;

(j) not long thereafter, the defendants sold the property to Chen Kong Fui and Chan Ooi Ling for RM2m;

(k) in 2016, See Sai Hong brought civil action Civil Suit No 22NCVC-566–10 of 2016 against Dato' Lai for damages and specific performance of an agreement to transfer shares in another company, known as Britania Star Sdn Bhd, to him;

(l) Dato' Lai then commenced Civil Suit 22NCVC-298–12 of 2016 ('earlier action') against the defendants here for the balance purchase price due under the agreement. Both cases were consolidated and heard together;

(m) on 8 June 2017, the High Court after hearing evidence, allowed the claim brought by Dato' Lai against the defendants but dismissed See Sai Hong's claim against Dato' Lai;

(n) the defendants and See Sai Hong appealed. In February 2018, the Court of Appeal dismissed See Sai Hong's appeal but allowed the appeal by the defendants and set aside the judgment given in favour of Dato' Lai. The

defendants succeeded on the ground that Dato' Lai had no locus standi to bring the action as the sale and purchase was with the plaintiff;

(o) on 28 May 2018, the plaintiff brought the present action against both the defendants;

(p) both defendants then filed an application in encl 10 to have the plaintiff's writ and statement of claim struck out pursuant to O 18 r 19(1); (b) ;(d) of the Rules of Court 2012 on the ground of res judicata and limitation; and

(q) on 17 December 2018, the learned High Court judge dismissed the application in encl 10 and ordered the case to go for trial. (defendants appealed to Court of Appeal — Appeal No B-02(IM)(NCVC)-129–01 of 2019 — against this decision and we heard it on the same day we heard the present appeal. At the end of which we dismissed defendant's appeal and the defendants did not lodge an appeal against our said decision).

THE PLAINTIFF'S CASE BEFORE THE HIGH COURT

[4] It was the case for the plaintiff that, apart from paying a sum of RM240,000, the defendants were in breach of the agreement for failing to pay the balance purchase price of the said property in the sum of RM1,233,333.

THE DEFENDANTS' CASE BEFORE THE HIGH COURT

[5] The defendants, on the other hand, denied they were liable to pay the balance purchase price on three grounds. Firstly, the claim was barred by res judicata on account of there was a claim by Dato' Lai in Civil Suit 22NCVC-298–12 of 2016 ('earlier action') against the defendants here for the balance purchase price due under the agreement. Secondly, Dato' Lai and/or the plaintiff had orally agreed to give the property to them in contra for the monies due to them from the former. Thirdly, the claim was barred by limitations.

FINDINGS OF THE HIGH COURT

[6] On the issue of 'res judicata', the learned High Court judge observed that the defendants had prior to the trial unsuccessfully applied by notice of application to strike out the plaintiff's claim on the ground of res judicata. The said application was dismissed by the High Court on the following grounds:

(a) the point in issue in the earlier action that was determined necessarily was that Dato' Lai had no locus to commence the action against the defendants as the assignment was invalid;

(b) Court of Appeal made no adjudication in the issue of whether the defendants have paid the balance purchase price under the agreement. The plaintiff company was accordingly at liberty to institute the proceeding to claim for the balance purchase price;

(c) in the earlier action, the validity of the assignment was not included in the list of agreed issues and the trial proceeded on the agreed issues prepared by the parties. The list of agreed issues constituted the agreed outcome of discussions between the parties; and

(d) the defendants having elected not to include the validity of the assignment as an issue to be tried and must be estopped from taking the position the plaintiff should have intervened in the earlier action.

Hence, the defendants are precluded from raising it by reason of estoppel.

[7] On the issue of the existence of contra agreement the learned High Court judge ruled, based on the available evidence, the defendants failed to prove the existence of a contra agreement between the parties as alleged by the defendants.

[8] Finally, on the issue of 'limitation' the learned High Court judge, ruled that the balance purchase price only became payable when the construction of the said property was completed and plaintiff by letter dated 23 February 2012, gave defendant 14 days to take vacant possession. The defendants' obligation to pay the purchase price only arose 14 days from that date. As such, the learned High Court judge found the defence of limitation is unmeritorious. Consequently, the learned High Court judge allowed the plaintiff's claim with RM30,000 cost.

APPEAL

[9] The appellants/defendant listed ten main grounds and five sub-grounds of appeal in their memorandum of appeal. All the grounds may be summarised into three broad grounds as follows:

(a) the learned High Court judge had erred in law and/or fact in failing to consider the plaintiff's claim is barred and/or estopped on the principle of res judicata;

(b) the learned High Court judge had failed to consider all the available evidence that proved the existence of a collateral contra agreement and hence had made an erroneous finding that the defendants failed to prove the existence of such an agreement; and

(c) the learned High Court judge had erred in law and/or fact in finding the plaintiff's claim is not statute-barred.

[10] Regarding the first ground, the defendants contended before us, that the learned High Court judge had erred in law and fact in failing to take into consideration that the plaintiffs claims are barred and/or estopped on the principle of res judicata. This is because there was a similar suit previously filed by the director of plaintiff, Lai Yeng Fok ('Dato' Lai') which was based on the same cause of action and claims against the defendants here.

[11] Regarding the second ground, it was contended by the defendants that the learned judge failed to take into consideration the shreds of evidences and oral statements produced by the defendants which supported the existence of a side by side oral collateral contra agreement/arrangement with the sale and purchase agreement that was signed between Dato' Lai, Dato' See Sai Hong ('Dato' See') and the defendants. The evidence that was produced during the trial by the defendants that purportedly proved the existence of the collateral oral agreement were:

(a) the oral statements made by the witnesses of the defendants are persistent and supported side by side in respect of the existence of oral collateral/arrangement in which the property was meant to be contra;

(b) the contemporary documents which is the sale and purchase agreement dated 28 April 2008 entered between the defendants and the vendor showed that the plaintiff had made payment of 10% of the purchase price of the land when the defendants/appellants were still the existing directors and shareholders of the plaintiff/respondent;

(c) the contemporary documents showed that the defendants indeed have paid a cash sum of RM199,988 (for the purpose of share capital payment) to the plaintiff company. As such, the injection capital of RM199,988 coincides with the payment of the 2% of the purchase price in SPA land which were contributed by Dato' See and the defendants;

(d) it was not disputed that Dato' Lai and/or any of the new shareholders of the plaintiff did not pay any consideration to the defendants to transfer the shares to the plaintiff; and

(e) on the probability of consideration, there must be a consideration in existence to transfer the shares to Dato' Lai and/or any of the new shareholders of the plaintiff in the form of oral collateral/arrangement in which the property was meant to be contra.

[12] Based on the above-said evidence, it was submitted by the learned counsel for defendants that, there must be a consideration in existence to transfer the shares to Dato' Lai and/or any of the new shareholders of plaintiff in the form of oral collateral/arrangement.

[13] Regarding the third ground, it was contended by the defendants that the learned High Court judge had erred in law and/or in fact in failing to take into consideration that the plaintiff is estopped from claiming against the defendants because it is merely an 'afterthought' and also the cause of action for recovery of the balance purchase price is barred by s 6 of the Limitation Act 1953 as it was filed more than six years after the balance purchase price became due.

OUR DECISION

[14] In our view, the issues to be dealt with are res judicata; limitation and whether the learned High Court judge had erred in Her Ladyship's finding that the defendants had failed to prove that the plaintiff through Dato' Lai had orally agreed to give the property to defendants in contra for the monies due to them.

RES JUDICATA

[15] As alluded to earlier, defendants took the position that the plaintiff was estopped by res judicata from pursuing the present claim as this matter had already been adjudicated by the Court of Appeal in the earlier action when it dismissed Dato' Lai's claim. It was argued by the learned counsel for defendants that it was open to plaintiff to intervene and added itself as a party to the earlier suit if it considered itself as having a cause of action against the defendants. Since the plaintiff, with full knowledge of its rights, had elected not to take steps to have itself added as an additional plaintiff to the earlier action, it ought not to be permitted to now bring this action.

[16] After scrutinising the cause papers and submission by parties, we are with respect, in agreement with the learned High Court judge that 'res judicata' does not apply in this case. To sustain a plea of res judicata in this appeal, it is important to look at the substance of what had been litigated and decided in the previous action. Gopal Sri Ram JCA (as His Lordship then was) in allowing the appeal against the decision of High Court in *The Pacific Bank Bhd v Chan Peng Leong* [1998] 2 MLJ 613 had this to say regarding res judicata:

> In my judgment, it is of essence, in cases of this nature, when the plea of res judicata is taken, to identify with precision the issue that was decided in the earlier proceedings, which is contended operates as a bar to re-litigation because;
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> ... to constitute a res judicata, the earlier judgment must, in terms of the Privy Council decision in *Kok Hoong v Leong Cheong Kweng Mines Ltd* [1964] MLJ 49 'necessarily and with precision' determine the point in issue (per Chang Min Tat FJ in *Tong Lee Hwa & Anor v Lee Yoke San* [1979] 1 MLJ 24 (refd) affirmed on appeal to the Privy Council in [1981] 1 MLJ 54).

> In the present instance, the point in issue in the 1st action that was determined necessarily and with precision was that the demand upon which that action was based was invalid. There was, in other words, no demand. The first action had therefore been commenced prematurely. The bank was accordingly at liberty to issue a proper demand and to institute proceedings to enforce the guarantee based upon the demand. In my judgment, neither res judicata, nor issue of estoppel operate to bar the second action.

[17] Now reverting to the present appeal, similarly here the point in issue in the earlier case that was determined and with precision was that Dato' Lai had no locus standi to bring the action against the defendants as the purported assignment was invalid. No adjudication was made by the Court of Appeal on the issue of whether the defendants have paid the balance of the purchase price under the agreement which is the core issue in this present appeal.

[18] Therefore, we are of the considered view that the learned High Court judge had not fallen into error when Her Ladyship decided that res judicata does not apply in the present case Furthermore, the doctrine of res judicata is not an inflexible rule. The court may decline to apply it in cases where it would be unjust to do so as was done in *Farlim Properties Sdn Bhd v Goh Keat Poh & Ors and other appeals* [2003] 4 MLJ 654; [2003] 4 CLJ 505 where it was said:

> ... further, since the purpose of the doctrine of res judicata is to achieve justice, a court ay decline to apply it where to do so would lead to an unjust result. And, further, whether res judicata in wider sense should be permitted to bar a claim is a matter that is to be determined on the fact of each case, always having regard to where the justice of the case lies.

[19] In conclusion, having regard to the factual matrix of this case, we find the principle of res judicata is not applicable. Even if the principle of res judicata is applicable (which we find not to be the case in this appeal) we are of the considered view that to apply the said principle would result in injustice. Hence, the learned High Court judge is right in finding the defendants could not rely on res judicata principle.

LIMITATION

[20] On the issue of limitation, the defendants contended that the plaintiff's claim for the balance of the purchase price was filed more than six years after the date the sale and purchase agreement was signed. Thus, according to the defendants, it was barred by s 6(1)(a) of the Limitation Act 1963.

[21] It is a well established principle that s 6(1)(a) of the Limitation Act 1953 is a mandatory provision which must be strictly observed unless there are sufficient facts to bring it within the exception as provided under s 29(b) of the

Act. In order to determine when the six years period commenced, it is vital to determine when was the cause of action accrued. The classic definition of cause of action was explained by the Federal Court in *Nasri v Mesah* [1971] 1 MLJ 32; [1970] 1 LNS 85 (FC) where Gill FJ said (p 34 MLJ):

> A 'cause of action' is the entire set of facts that gives rise to an enforceable claim; the phrase comprises every fact which, if traversed, the plaintiff must prove in order to obtain judgment (per Lord Esher MR in *Read v Brown* (1888) 22 QBD 128, 131). In *Reeves v Butcher* [1891] 2 QB 509, 511 Lindley LJ said:
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> This expression, 'cause of action', has been repeatedly the subject of decision, and it has been held, particularly in *Hemp v Garland* (1843) 4 QB 519, decided in 1843, that the cause of action arises at the time when the debt could first have been recovered by action. The right to bring an action may arise on various events; but it has always been held that the statute runs from the earliest time at which an action could be brought. In *Board of Trade v Cayzer, Irvine & Co* [1927] AC 610, 617. Viscount Dunedin described 'cause of action' as that which makes action possible. Now, what makes possible an action founded on a contract is its breach. In other words, a cause of action founded on a contract accrues on the date of its breach. Similarly, the right to sue on a contract accrues on its breach. In the case of actions founded on contract, therefore, time runs from breach (per Field J in *Gibbs v Guild* [1881] 8 QBD 296, 302). In the case of actions founded on any other right, time runs from the date on which that right is infringed or there is a threat of its infringement (see *Bolo*'s case LR 57 IA 325).
>
> It would seem clear, therefore, that the expressions 'the right to sue accrues', 'the cause of action accrues' and 'the right of action accrues' mean one and the same thing when one speaks of the time from which the period of limitation as prescribed by law should run.

[22] Reverting to this appeal, it is the finding of the learned High Court judge that it is not in dispute that no progress payments were sought by plaintiff from defendants during the construction of the property, no date was set for payment of the purchase price. Hence, the learned High Court judge found the balance purchase price only became payable when the construction of the property was completed and when the plaintiff by letter dated 23 February 2012, gave the defendants 14 days to take vacant possession of the property and to pay the purchase price. Thus, the learned High Court judge found the defendants' obligation to pay the purchase price arose 14 days after the 14 days period. Since, the suit was brought against the defendants on 28 February 2018, we find the learned High Court judge was right in concluding that the defence of limitation put up by defendants is unmeritorious.

CONTRA AGREEMENT

[23] The next and final issue is whether there was contra agreement and if so who were the parties. Clearly, this is an issue which is fact-sensitive. It is trite

law that the specific finding of facts by the learned High Court judge as a trier of facts should not be disturbed by an appellate court such as this court herein unless that finding was plainly wrong: see *Ming Holdings (M) Sdn Bhd v Tuan Syed Azahari bin Noh Shahabudin & Anor* [2010] 4 MLJ 577; [2010] 6 CLJ 857 (FC) paras 41–48; In the case of *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97; [2003] 2 CLJ 19 the Court of Appeal held as follows:

> ... an appellate court will not, generally speaking, intervene unless the trial court is shown to be plainly wrong in arriving at its decision. But appellate interference will take place in cases where there has been no or insufficient judicial appreciation of the evidence.

[24] The Federal Court in *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309 held that the test of 'insufficient judicial appreciation of evidence' adopted by the Court of Appeal was in relation to the process of determining whether or not the trial court had arrived at its decision or findings correctly based on the relevant law and the established evidence.

[25] Bearing in mind the above principles it is important for us to look at the position taken by respective parties, the available evidence and as to how the learned High Court judge dealt with those evidence.

[26] In this case, the defendants took a clear position that they have no obligation whatsoever to pay the plaintiff the purchase price of RM1,473,333 based on an alleged contra arrangement. According to defendants, these contra agreements was reached and proven based on the following facts:

(a) investment allegedly made by the defendants in the plaintiff;

(b) the defendants' agreement to resign as directors and shareholders of the plaintiff and to transfer their shares in favour of Dato' Lai and new shareholders/investors; and

(c) the defendants' agreement not to receive any payment in respect of the transfer of their shares to Dato' Lai and new shareholders.

[27] The plaintiff on the other hand took the position that there was no such oral contra agreement. The plaintiff relied on the terms of the sale and purchase agreement which had been reduced into writing which under cl 3, clearly reveals that the plaintiff is the owner and seller of the said property while the defendants are the purchaser and cl 9 stipulate the sale consideration is RM1,473,333. The sale and purchase agreement clearly makes no qualifications or reference to any 'contra' agreement. It also does not stipulate the said property was given for free to the defendants.

[28] Faced with the opposing position taken by the parties and conflicting evidence tendered on behalf of both parties, the learned High Court judge after a full trial, concluded that on the evidence, the defendants have failed to prove the existence of a contra agreement. Her Ladyship gave the following reasons, starting from paras 23 to 30 of the grounds, for coming to the said conclusion:

> 23. The question of whether there is a contra agreement and who were the parties tothe same are questions of fact. This Court is faced with the task of deciding these factual issues on which there is a serious conflict in the evidence to wit, theevidence of Dato' Lai that that there was no contra agreement; and the evidence of the second defendant and See Sai Hong which was to the opposite effect. It was for the defendants of course to prove that there was a contra agreement asalleged by them.
>
> 24. Having considered the evidence, I accept the evidence of Dato' Lai in preferenceto that of the second defendant and See Sai Hong on the disputed facts. Dato' Lai's evidence was corroborated by the letter of 7 June 2013, from Messrs Tengku Maria, Lim & Ong. It will be recalled that by the letter the plaintiff soughtthe payment of the purchase price due under the agreement.
>
> 25. I do not accept the evidence of the defendants that the loan that was applied from OCBC was for a purpose other than to finance the purchase of the property. It was unlikely that the OCBC letters would not have been copied to the plaintiff if the defendants' version that it was a loan is true. I am satisfied on the evidence that the OCBC loan was sought to finance the purchase the property.
>
> 26. It is true that in the letter dated 13 June 2013, Dato' Lai had confirmed that the defendants have fully settled the purchase price.
>
> However, there is force in Dato' Lai 1st explanation as to why he issued the said letter. The fact that the heading of the said letter refers to the sale agreement between the defendants and Chen Kong Fui and Chan Ooi Ling and there is no mention of the contra agreement lends credence to his explanation. He had issued the letter to help See.
>
> 27. The defendants' version of the facts was difficult to believe. It is pertinent to notethat there is no mention of the contra agreement in the agreement. The plaintiff is a company and here was no contemporaneous evidence either by way of correspondence or a board resolution evidencing the contra agreement alleged by the defendants.
>
> 28. Further, it was unclear from the defendants' evidence at trial as to what was their case. Were they alleging that the alleged oral contra agreement was with the plaintiff or Dato' Lai or both. The plaintiff cannot be bound by an alleged contra agreement reached between Dato' Lai, See and the second defendant asa company is separate from individual from its shareholders and directors.
>
> 29. It is also pertinent that in the Defence, the defendants did not furnish sufficient particulars as regards the contra agreement and the investments allegedly madeon behalf of the plaintiff company. There are also no documents to support the defendants' assertion that they had made investments on behalf of the plaintiff. This was acknowledged by the second defendant. He testified that he had made a payment of about half a million ringgits towards the 10% deposit to purchase theland. And this sum was paid in cash to See. However, under cross-examination

See claimed that he paid the 10% deposit amounting to more than RM1,050,000.00. If indeed they had paid the 10% deposit for the land, it was odd that there was no mention of this payment in the earner action that was brought against them by Dato' Lai.

30. It is also pertinent that in the Defence, the defendants did not furnish sufficient particulars as regards the investments/payments allegedly made on behalf of theplaintiff company which purportedly led to the contra agreement.

[29] Looking at the above-quoted grounds, it is apparent to us that the learned High Court judge had undertaken a detailed analysis of all the available evidence presented by both parties before making a finding of fact that the existence of the alleged contra agreement was not proven. Thus, we find the allegation by the learned counsel for the defendants that the learned trial judge had failed to consider all the available evidence presented before making her decision is rather inaccurate, to say the least. On the contrary, we find the learned trial judge had sufficiently and judiciously appreciated all the evidence presented by both parties. defendants failed to convince us that the learned High Court judge is plainly wrong in her finding of fact on this issue. Hence, we find this issue also has no merit.

CONCLUSION

[30] As a conclusion, we unanimously are of the considered view that there is no appealable error made by the learned High Court judge that could warrant appellate intervention. Hence, we find no merit in the appeal. The appeal is accordingly dismissed. The decision of the High Court judge date 26 June 2019 is affirmed. Cost of RM30,000 to defendant/respondent subject to allocator fees.

Appeal dismissed; decision of HCJ affirmed with costs of RM30,000 to respondent subject to allocator fees.

Reported by Dzulqarnain Ab Fatar